



Ober & another v County Government of Homa Bay & 3 others (Judicial Review E037 of 2024) [2025] KEELRC 1305 (KLR) (7 May 2025) (Ruling)

Neutral citation: [2025] KEELRC 1305 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
JUDICIAL REVIEW E037 OF 2024**

JK GAKERI, J

MAY 7, 2025

BETWEEN

JARED OMONDI OBER 1ST APPLICANT

JOHN OLUOCH ORINDA 2ND APPLICANT

AND

COUNTY GOVERNMENT OF HOMA BAY 1ST RESPONDENT

PROF BENARD MUOK 2ND RESPONDENT

ALPHONCE WERA 3RD RESPONDENT

NELLY OBAMBO 4TH RESPONDENT

RULING

1. Before the court for determination is the Ex parte Applicants Chamber Summons dated 22nd November, 2024 and amended on 5th March, 2025 seeking Orders:
2. 1A That by way of Judicial Review an Order of MANDAMUS do issue compelling the respondent namely; Professor Bernard Muok (Homa Bay County Secretary), Alphonce Wera (Chief Officer Finance, Homa Bay County) and Nelly Obambo (Human Resource Director, Homa Bay County) to pay the Ex Parte applicant the sum of Kshs.8,401,755.00 with interest at court rates from 16th November, 2011 until payment in full together with costs taxed at Kshs.202, 095 with interest at court rates from 4th October, 2018 and delivered on 4th October, 2018 in Kisumu Employment and Labour Relations Court Case No. 39 of 2013: Jared Omondi Ober and another V County Government of Homa Bay.
3. 2A An Order of Mandamus seeking leave for an Order of mandamus on the respondents cited herein to pay the ex parte applicant the decretal sum owed.



3A The costs of this application be borne by the respondents.

4. The ex parte Chamber Summons is expressed under Section 8 and 9 of the [Law Reform Act](#), Section 1A, 1B and 3A of the [Civil Procedure Act](#) and Order 53 Rule 1 and 2 of the Civil Procedure Rules, 2010 and is based on the grounds set out on its face the Statement Accompanying Facts and the Affidavit Verifying statement of facts sworn by the ex parte applicant on 5th March, 2025.
5. The ex parte applicant states that by a Judgment dated 4th October, 2018 in Kisumu ELRC No.39 of 2013, Jared Omondi Ober & Another V Homa Bay County Government, delivered on even date he was awarded Kshs.8,401,754.00 with costs and interest at court rates from 13th November, 2009 until payment in full and by a Ruling dated 17th January, 2023 the applicant was awarded costs of the suit with interest, taxed at Kshs.202,095 and despite service of notice under Section 21 of the [Government proceedings Act](#), the respondent has refused to settle the decretal sum.
6. The ex parte applicant states that he was a former employee of the Homa Bay Municipality and was unlawfully dismissed from employment and the decretal sum and interest amounts to Kshs.21,048,849.00.
7. By its Grounds of Opposition dated 2nd April, 2025, the respondents state that the application before the court is misconceived, ill motivated and intended to institute Judicial Review against the respondents through an improper process and the application is incompetent, fatally and incurably defective on account that it was instituted contrary to the provisions of Section 21(1) and (3) of the [Government Proceedings Act](#) as the ex parte applicant had not obtained the certificate of costs and a Certificate of Order Against the Government.
8. That the applicant had not demonstrated that he had exhausted all avenues of satisfying the decree including conducting a joint reconciliation exercise as directed by the court on 23rd November, 2018.
9. That the applicant was involved in piecemeal litigation and was seeking drastic orders against County Officers not party to the proceedings.
The respondents pray for dismissal of the application with costs.
10. In addition, by a Replying Affidavit sworn by Mr. Japhet Osoro Kaosa Advocate on 7th April, 2025, counsel deposes that the respondents had not denied that the applicant was entitled to the amount on the certificate and the respondents will not suffer any prejudice and having commenced payment, the respondents ought to pay the balance which was the essence of the instant application.
11. The applicant cited the sentiments of the Court in Republic V Permanent Secretary Ministry of State for Provincial Administration and Internal Security ex parte Fredrick Manoah Egunza [2012] eKLR and Jaribu Credit Transfers Ltd V Nairobi County Government [2018] eKLR on the requirements of Section 21 of the [Government Proceedings Act](#), but did not confirm having complied with them.

Applicant's submissions

12. By 23rd April, 2025, the applicant had neither filed nor served submissions as reported by counsel for the respondents and as confirmed by the court on the CTS.

DIVISION - Respondents submissions

13. On whether the applicant had obtained a Certificate of Order Against the Government, counsel for the respondents submitted that it was settled law that for an order of mandamus to issue, the provisions of Section 21 of the [Government Proceedings Act](#) and Order 29 of the Civil Procedure Rules must be complied with.



14. Reliance was placed on the sentiments of the court in Republic V Principal Magistrates Court at Mavoko & Another Ex Parte Joseph Ole Lenku Government of Kajiado County & Another [2018] eKLR, to urge that the procedures for execution against the government were elaborated and having missed a crucial step the order of mandamus cannot issue.
15. That the County Government cannot commit funds to settle the decretal sum unless it was budgeted for.
16. Counsel urged that the applicants Chambers Summons was statute barred and should be struck of.
17. As to whether the applicant had met the threshold for grant of the Orders of mandamus, reliance was placed on the sentiments of A. N. Ndungu J. in Republic V Chief Magistrate's Court Milimani Commercial Court & 20 others Ex parte Fredrick Bett [2022] eKLR on the essence of leave, to submit that the Order of mandamus could not issue in this instance.
18. Counsel urged that issue of any of the Orders sought would be in vain and could only grant leave to apply for mandamus as there was no substantive application for mandamus and parties are bound by their pleadings unless amended.
19. As regards the granting of unpleaded reliefs, reliance was placed on the sentiments of Nyagaka J in Charles Pkiyach Kiyara V Lomerisiya Duntom [2022] eKLR as well as those of Githua J in Republic V Attorney General Ex Parte Kahugu Karebe [2012] eKLR to urge that the prayers cannot issue at the stage as parties have not been heard.
20. As regards jurisdiction, counsel submitted that the application was fatally defective for non-compliance with procedure as no primary pleading is on record for Judicial Review which renders the application defective.
21. Counsel urged the court to strike out the application for being incompetent and an abuse of the court process.
That costs should be borne by the applicant.
22. The only issue for determination is whether the ex parte applicant's Chamber Summons dated 22nd November, 2024 and amended on 5th March, 2025 is merited.
23. From the record, it is clear that the ex parte applicant sued the County Government of Homa Bay and was awarded the sum of Kshs.8,701,754.00 vide a Ruling delivered on 13th November, 2019 pursuant to the judgment dated 4th October, 2018 which had directed parties to compute the award and file the same for confirmation within 30 days. The respondent did not file its computation.
24. It is also evident that after the award, the respondent sought a stay of execution of the judgment vide a motion on notice dated 3rd June, 2020, which the Court of Appeal dismissed on 29th January, 2021 paving the way for execution.
25. Documents filed by the applicant reveal that the respondent paid the ex parte applicant the sum of Kshs.505,140.00 vide cheque No.001511 dated 28th September, 2021 and Kshs.600,000.00 vide cheque number 001510 dated 28th September, 2021 and the balance has been outstanding since then.



26. The ex parte applicant's Chamber Summons dated 22nd November, 2024 filed on 23rd November, 2024 sought the Orders of Mandamus against the respondent exclusively but as adverted to elsewhere in this ruling it was amended on 5th March, 2025 to include prayer 2A which reads as follows:

“An Order of mandamus seeking leave for an Order of mandamus on the respondents cited herein to pay the ex parte applicant the decrement sum owed”.

27. Since prayer 1A is seeking an Order of MANDAMUS against three officers of the County Government of Homa Bay and prayer 2A is also seeking an Order of mandamus, the amendment of the ex parte Chamber Summons did not alter its character.

28. Instructively, the ex parte applicant's Replying Affidavit, which was filed out of time made no reference or controvert the respondent's grounds to opposition which raise critical threshold questions including, but not limited to exhaustion of other avenues of satisfying the decree such as written demands and follow up, bearing in mind that the respondent had commenced payment which, in the courts view, was a manifestation of good faith on the part of the respondent.

29. Having grounded the instant application on the requirements of Section 8 and 9 of the Law Reform Act and Order 53 Rule 1 and 2 of the Civil Procedure Rules, 2010, it was incumbent upon the applicant to demonstrate that these provisions had been complied with.

Order 53 rule 1 and 2 provide:

- (1) No application for an order of mandamus, prohibition or certiorari shall be made unless leave therefor has been granted in accordance with this rule.
- (2) An application for such leave shall be made ex parte to a judge in chambers, and shall be accompanied by —
 - (a) a statement setting out the name and description of the applicant, the relief sought, and the grounds on which it is sought; and
 - (b) affidavits verifying the facts and averment that there is no other cause pending, and that there have been no previous proceedings in any court between the applicant and the respondent over the same subject matter and that the cause of action relates to the applicants named in the application.

30. The court is alive to the interesting and thought provoking views on whether leave is still a requirement in particular in the post Constitution of Kenya, 2010 dispensation, coupled with the arguments whether the provisions of the Fair Administrative Action Act repealed the provisions of Section 8 and 9 of the Law Reform Act.

31. The requirement of leave to institute a suit for Judicial Review Orders has been articulated in countless decisions in Kenya and elsewhere such as IRC V National Federation of Self-Employed and Small Business Ltd [1982] AC 617, (See Lord Diplock), R V Secretary of State for Environment ex parte Greater London Council [1985] Times 30 December, O'Reilly V Mackman [1983] 2 A. C 286 at 294 (Lord Diplock), Cocks V Thanet District Council [1983] 2 A C286 at 294 (Lord Bridge), Felix Kiprono Matagei V Attorney General; Law Society of Kenya (Amicus Curie) (2021) eKLR Korir J (as he then was).

32. See also James Gacheru Kariuki & 22 Others V Kiambu County Assembly & 3 Others Justice Professor J. Ngugi (as he then was) Nirmal Singh Sindhu & 8 others V Director General National Environment Management Authority & another; Lavington United Church (Interested Party [2025]



eKLR, (Mboya J) County Government of Nyeri & another V Cecilia Wangechi Ndungu [2015] eKLR.

33. Instructively, since the applicant did not contest the requirement of leave, the court is in agreement with the sentiments of Ngaah Jairus J. in *Nation Media Group Ltd V Commissioners Media Council Complaints Commission; Njoroge & another (Interested Party)* [2024] KEHC 3417 (KLR) where the learned Judge held as follows:

“In conclusion, I would say that there is no doubt that the reasons for the requirement of the leave still subsist in our current circumstances notwithstanding the apparent developments in the area of judicial review. There is no doubt, for instance, that with the expanded space for agitation of rights and freedoms in the wake of *the Constitution* of Kenya 2010, there are bound to be more cases brought before courts for adjudication on the question of individual rights and freedoms. While many of them will be genuine attempts and efforts to assert these constitutional guarantees, it cannot be ruled out that the number of litigants that the Lord Scarman described in *IRC V National Federation of Self-Employed and Small Businesses Ltd* (supra) as “busybodies, cranks and other mischief makers” will, in all likelihood, also increase exponentially. So, besides other equally important reasons for which leave is required and to which I have adverted in this ruling, the need for leave to sift out cases of this category of persons, if not for anything else, to protect the integrity of court process cannot be over-emphasised; if anything, it is more necessary now than it has ever been before.

On the whole, when the question of the requirement for leave is considered from the wider perspective of why leave is necessary in the first place, it is easier to see why it cannot be the intention of *the Constitution* or the *Fair Administrative Action Act* to discard this requirement. Why? The reasons for this requirement are as much relevant today as they were before the promulgation of *the Constitution* of Kenya, 2010 and the enactment of the *Fair Administrative Action Act*.

For all I have said, I am satisfied that there is merit in the 2nd interested party’s preliminary objection. It is hereby sustained and the applicant’s suit struck out with costs to the interested parties”.

34. As correctly submitted by the respondent, at this stage the only order the court ought to grant is leave for the ex parte applicant to file a substantive application for the Order of mandamus for the court to hear both sides on the application and make a conclusive determination on merits, but as adverted to earlier in this ruling, prayer No. 1A and 2A of the ex parte applicant’s Chamber Summons dated 5th March, 2025, seek the Order of mandamus.
35. As matters stand, here is no application for leave to apply for the Orders of mandamus before the court and as contended by the respondent’s it is trite law that parties are bound by their pleadings.
36. See *Galaxy Paints Ltd V Falcon Guards Ltd, Adetuon Oladeji (NIG) Ltd Nigeria P.L.C SC 91/2002* cited in *Joseph Nziu V Kenya Orient Insurance Co. Ltd* [2015] eKLR, *Daniel Mogire V South Nyanza Sugar Co. Ltd* [2018] eKLR and *Raila Amolo Odinga & Another V IEBC & 2 Others* [2017] eKLR.
37. When the matter came up for hearing on 4th March, 2025 Mr. Otieno Mboya sought leave to come on record for the respondents and clearly stated that the application was at the leave stage and counsel for the ex parte applicant sought 3 days leave to amend the application and was accorded 3 days to do so.
38. Mr. Otieno Mboya was accorded 7 days to respond to the amended motion.



39. Intriguingly, the amended application filed on 5th March, 2025 did not incorporate the prayer for leave to file for an Order of mandamus as a sole prayer.
40. Similarly, and as submitted by the respondents and without delving into the details, the applicant has not complied with the provisions of Section 21 of the [Government Proceedings Act](#) and has not obtained a Certificate of Order Against the Government, a requirement the ex parte applicant is well aware of as guided by the authorities improperly cited in the Replying Affidavit sworn by the advocate on 7th April, 2025.
41. Flowing from the foregoing, the court is satisfied that the ex parte applicants chamber summons dated 5th March, 2025 is fatally and incurably defective and is struck out with costs to the respondents.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KISUMU ON THIS 7TH DAY OF MAY, 2025.

DR. JACOB GAKERI

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of [the Constitution](#) which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of [the Constitution](#) and the provisions of Section 1B of the [Civil Procedure Act](#) (Chapter 21 of the Laws of Kenya) which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

DR. JACOB GAKERI

JUDGE

